



In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 5395 of 2000.

In the matter of:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-And-

In the matter of:

Prof: A.K. Monaw-War-Uddin Ahmed and
others.

..... Petitioners.

-Versus-

The Register of Joint Stock Companies and
others.

.... Respondents.

Mr. Taufique Nawaz, Senior Advocate

.... For the Petitioner.

Mr. Sheikh Fazle Noor Taposh with

Mr. Imranul Kabir and

Mr. Khandaker Reza-E- Raquib, Advocates

.... for the respondent No. 5

Mr. Rakanuddin Ahmed, Senior Advocate with

Mr. Md. Asaduzzaman, Advocates

.... for the respondent No. 6

Heard on: 03.03.2010, 18.03.2010,

08.04.2010, 22.04.2010, 11.10.2010.

Judgment on: 06.01.2011

Present:

Mr. Justice Md. Mamtaz Uddin Ahmed

And

Ms. Justice Naima Haider.

Md. Mamtaz Uddin Ahmed, J:

On the application under Article 102 of the Constitution of the
People Republic of Bangladesh ^{by the Petitioners} the Rule was issued calling upon the



respondent No.1 to show cause as to why the impugned memorandum and Article of Association (Annexure-B) accepted by the Respondent No.1 and the impugned certificate of Incorporation dated 23.11.1996 (Annexure-B) issued by the respondent No.1 to the proforma respondent NO.6 shall not be declared to have been made without lawful authority and is of no legal effect and or such other or further order or orders passed as to this Court may seem fit and proper.

The Petitioner No.1 is Dr. A.K.Monaw-war Uddin Ahmed, a Professor of Economics, at the University of Dhaka, having been Dean of the Social Science Faculty at the same University, is a citizen of Bangladesh; the Petitioner in the usual course of his academic profession is concerned with the pursuit of knowledge of Economics as a major Discipline concerning the welfare of people, including citizens of Bangladesh. During his academic career he has closely studied, researched, taught written on macro and micro economics including, financial institutions, para-statels, firms and other economic units involved in economic activities in the country. The Petitioner was educated at the Universities of Dhaka, Cambridge and Sydney.

The Petitioner No.2 Mir Shamsul Islam, a citizen of Bangladesh is a Retired Additional Commissioner of Taxes has been interest in the smooth, efficient and lawful tax administration

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of the country including in particular the payment of taxes to the state by corporations, companies, registered firms, unregistered firms, association of Persons, undivided Hindu Families and other persons required to so do by law. The petitioner is deeply concerned that in a country of approximately 130 million people, there are only about 8 lakh tax payers, a fact which severely undermines the tax structure and the capacity of the State to generate revenue. Furthermore, the Petitioner is concerned that if charities be undertake business, through the grant of a new status without legislation, great uncertainty will be created, the State will be ill equipped to detect tax accounting frauds, and that the revenue earnings of the country would be permanently damaged.

The Petitioner No.3 Mr. Abu Zahid, a citizen of Bangladesh is an Advocate of the Supreme Court enrolled in the High Court Division since 1985 and having earlier been enrolled on as Advocate in 1980. The Petitioner has acquired deep insights into the functioning of organs of the state, business entities, charities and other persons created by or under a statute so that being deeply aggrieved by the inconsistencies and anomalies which have emerged in the discharge of functions by the government and other persons authorised by law in performing the functions of the state, the Petitioner No.3 has preferred to move this Hon'ble Court to

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consider the grave public wrongs caused by the action of the Respondents Nos. 1, 2, 3 and 4 by unlawfully enabling in the garb and disguise of a company, and by further enabling the Respondent No.5 Bengal Lands Limited, a company unlawfully incorporated to obtain benefits and safeguards available to a charity.

The Petitioner No.4, Mr. Nurul Islam Bhuiyan, is a citizen of Bangladesh who is engaged in business and who has, in the usual course of his work, been required to interface with government, and its agencies, with government officials entrusted with the responsibility regulatory and permission granting functions on behalf of the Republic whereby the Petitioner No.4 has had the benefit of information and insights into the manner in which the government, companies, business houses, charities and other non-governmental organisations discharge their obligations, that being deeply concerned with the failure, non-application of mind by governmental agencies and other persons authorised to discharge the functions of the State, the Petitioner No.4 prefers this Petition.

The Petitioner No.5, Mr. Nurul Kabir is a citizen of Bangladesh, a journalist by profession, presently the City Editor of the political weekly, "The Holiday", having earlier been a Senior Reporter for about 10(ten) years in the Daily Star and the Daily Independent for a year. The petitioner is an Honours Graduate and

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Masters Degree holder in English and holds a degree in Law under Dhaka University.

Facts leading to the disposal of the Rule in short are that the BRAC. Proforma-Respondent No.5 is an association of persons having registered as a society with the Registrar of Societies (which functions are carried out by the Registrar of Societies) on 18 November, 1972 under the Act for Literary and Scientific Institutions and Charitable Societies Act, 1860 (Societies Registration Act, 1860). Section 20 of the said Societies Registration Act, 1860 provides that the following societies may be registered under the Act:-

"Charitable societies, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge [the diffusion of political education], the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of painting and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs".

The BRAC, Proforma-Respondent No.5 known at the time of its registration as the "Bangladesh Rural Advancement Committee", and now as BRAC registered with the Registrar of Societies vide its memorandum of Association.

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The Proforma Respondent No.6 is purportedly a private company limited by shares having registered on 23/11/1996 unlawfully incorporated with the Registrar of Joint Stock Companies, and carrying on business in the garb and disguise of company when in reality it is a society registered by the name of BRAC under the Societies Registration Act, 1860, the statute under which it was registered as a legal person. The Proforma-Respondent No.6 unlawfully as it has been constituted, has been carrying on business persistently, in continuous breach, and utter disregard of the laws of Bangladesh.

The Proforma-Respondent No.7 is Mr. Mazherul Quader, whose address in the Memorandum and Articles of Association has been set down as BRAC Centre, in the absence of any further particulars relating to his occupational or professional status being set out in the Memorandum and Articles of Association about the Respondent No.7, it is evident that the said Proforma-Respondent no.7 is an employee or is otherwise connected with BRAC with no separate or independent legal personality of his own.

The Proforma Respondent No.8 is Mr. Abul Mueyed Chowdhury, the Chief Executive or Executive Director, BRAC, a charitable society registered under Societies Registration Act, 1860.

The Proforma-Respondent No.9 is Dr. Salehuddin Ahmed purporting to act as Chairman of the Board of the Proforma-Respondent

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No.6, that the said -Respondent No.9 is a nominee of BRAC, the registered society. The said Respondent No.9 being a paid employee of BRAC has no independent or separate status apart from his employer BRAC in the Proforma-Respondent No.6.

The Proforma-Respondent No.10 is Mr. Shawkat Hossain, Finance Manager, BRAC is a paid employee of BRAC having, in the eye of law no independent status or identity whatsoever apart from his employer BRAC in the Proforma-Respondent No.6.

The Respondent No. 1 incorporated the Proforma-Respondent No.6, BRAC Bd, Mail Network Limited by entering in its books as Registry No.C 31834(955)/96 the Memorandum and Articles of Association in complete and utter disregard of the law.

Pursuant to the said entry into the Register maintained in the offices of the Registrar of Joint Stock Companies, the Respondent No.1 issued the impugned Certificate of Incorporation.

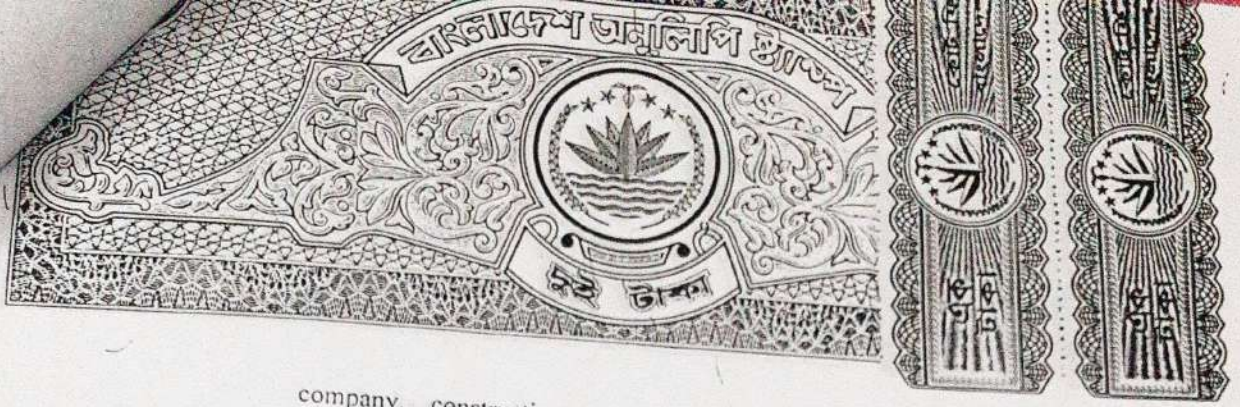
Thereafter, the Proforma Respondent No.5 (BRAC) invested monies in the purported Proforma-Respondent No.6 to the extent of Tk.10,00,000/- (Taka Ten lakhs) only, being 50% of the paid up capital of the Respondent No.6 as is evident from the Memorandum and Articles of Association of the Proforma-Respondent No.6. Since the employees of the Proforma Respondent No.5 hold a further 1000 shares in the sum of



Tk.100,000/- (One lac) and the Proforma-Respondent No.5 directly controls 55% of the shares of the Proforma-Respondent No.6.

It is apparent from the objects of BRAC, the Proforma-Respondent No.5, in particular clause 3(i) of its Memorandum of Association that the Proforma-Respondent No.5 is entitled to engage itself in charitable purposes and social welfare activities strictly on non-profit basis and other activities consistent with societies listed under Section 20 of the Societies Registration Act, 1860; but nowhere under its terms of registration (establishment) the Proforma-Respondent No.5 permitted to undertake the activity of sponsoring, owning, controlling or operating a private company limited by shares whose objects are (1) to provide on line e-mail and other computer based communication and network services as a services as a service provider. To provide information to users on various areas of Bangladesh to world wide users of Internet to promote business and communication to and from Bangladesh. (2) To set up and run a facility to carry out data entry and software development work in Bangladesh on behalf of overseas and local companies. (3) To take up the business of distribution and marketing of computer products (4) To import, buy, sell or otherwise deal with all kinds of computers, their components accessories, software, parts and any other material that the company may deal with as set out in the Memorandum of Association of the Proforma-Respondent No.6; or indeed for that matter a real estate

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company, construction company, agro industry, housing finance company, or other commercial enterprise including micro-credit, involving a creditor-debtor relationship with micro-credit borrowers, nursery or distribution or sale of genetically modified seeds in the fields of Bangladesh, or the placement of private bonds in the capital market.

The ownership of shares by BRAC, the Proforma-Respondent No.5, in the said purported BRAC, BD Mail Network Ltd., the Proforma-Respondent No. 6, is not a purpose consistent with Section 20 of the Societies Registration Act, 1860 inasmuch as the said Section 20 of the Act contemplates activities of registered societies, *inter-alia*, that in the field of promotion of science, literature, fine arts, diffusion of useful knowledge but not as a private company limited by shares.

If the Proforma-Respondent No.5, a registered Society under the SRA, 1860 is allowed to own, control, manage and operate the business of telecommunications as set out in paragraph 17 in violation of the terms and conditions and laws of its registration, there will be a serious undermining of the commercial, financial and more importantly legal framework in the country with the effect, *inter-alia*, that legitimate and otherwise qualified entites and persons will be precluded from undertaking commercial activities and financial activities and serious financial indiscipline imminent in Bangladesh.

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By its non-application of mind in allowing BRAC to subscribe and purchase shares in BD Mail Network Limited, the Respondent No.1 has unlawfully permitted BRAC a registered society, and by its objects a charity strictly for non-profit to incorporate a company and undertake business for profit or gain; that in doing so it has caused a metamorphosis by allowing a charity to operate in the guise of a company rendering the legal regime governing of charities meaningless and contrary to several laws; in particular, by a failure to apply his mind the Registrar has prejudiced, undermined, jeopardized and encroached upon the rights of Judges of the Supreme Court, the Comptroller General of Audit, the Prime Minister and other Ministers, the Speaker and even the President of the Republic who are subject to Article 147(3) of the Constitution by precluding the said persons from their right to hold office, post or position or to take part whatsoever in the management or conduct in the affairs of an entity, which includes a charity, if that entity undertakes activities for gain or profit; that the undertaking of business by any charity whether directly or by subscribing or purchasing shares in and controlling and managing that company would completely breakdown the distinction between a charity and a commercial or business entity and thereby preclude all of the above persons from their right to participate in, and undertake activities of charitable societies; further that by his non-application of mind in allowing BRAC to subscribe in, purchase shares,

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control, manage conduct and operate the purported Proforma-Respondent No.6 company, the Respondent No.1 has broken down the distinction between a charity and a company, and has prejudiced, undermined, and encroached upon the rights of Judges of the Supreme Court who are prohibited by the Rules of Conduct for Supreme Court Judges vide Rules 9 and 10, framed under Article 96 of the Constitution, from participating in and undertaking activities of charitable societies which the Registrar (Respondent No.1) has permitted to convert into companies for gain or profit.

By failing to apply its mind to the legal capacity of a society registered under SRA, 1860 the respondent No.1 has precluded Advocates enrolled with the Bar Council of Bangladesh from taking part in the management or conduct any association or body including charities having gain as its object, since Advocates may not undertake commercial activities under the Bangladesh Legal Practitioners and Bar Council Order 1972.

By not applying its mind to the legal capacity of an entity the Respondent No.1 has thrown open the whole question of the legitimacy of legal persons who may subscribe, purchase, control and manage a company inasmuch as by failing to apply his mind the Respondent No.1 has made it possible for political parties formed under the Political Parties



Ordinance, 1978 to form incorporate, subscribe and purchase shares, control and manage a company whose objective was gain or profit.

By failing to apply its mind to the legal capacity of a charity the respondent No. 1 has prejudiced, undermined and encroached the rights of Government Servants as provided for under Article 133 of the Constitution and the Rules made there under {the Government Servants(Conducts Rules)} whereby Government Servants are permitted by Rule 17 to undertake honorary work of a charitable nature whilst being prohibited by Rule 16 to take part in the promotion, registration or management of any bank or company.

The Respondent No.3 being the Ministry of Post and Tele-Communications failed to apply its mind to a legal capacity of a Society registered under SRA 1860 to subscribe and purchase shares, control and manage a company when it issued the Licence bearing No.PT/Sec-5/ISP(BRAC)-34/99-89 favouring the purported Proforma-Respondent No.6; that by issuing such a licence to Proforma-Respondent No.6, the Respondent No.1 has broken down the distinction between a charity and a company and thereby violated the several laws affecting the rights of an indeterminate number of people, a multitude of individual any number of the public and committed a public wrong, several public wrongs and further affected the fundamental rights and indeterminate number of

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persons, any member of public in utter disregard under Article 27 and 31 of the Constitution...

The Respondent No.4 being the NGO Affairs Bureau under the Prime Minister's Secretariat, Government of Bangladesh has failed to apply its mind persistently, continuously and in every case of approving foreign donations to make to the Proforma Respondent No.5 namely BRAC in violation of the Foreign Donations Voluntary activities under the Ordinance are exhaustively listed and which activities do not include the undertaking of Internet Services to be provided by a recipient of such donations and/or where such a recipient applies such foreign donations wholly or partially for the undertaking of activities not included in the said Ordinance.

To allow the Proforma Respondent No.5 to invest monies in, sponsor, subscribe, own control and operate the purported Proforma-Respondent No.6 as a company would also render nugatory the intent and provisions of the Bankruptcy Act, 1997 wherein it has been stated that a charity cannot be sued under the bankruptcy Act and whereas the proposed Proforma Respondent No.6 being owned by a registered society and/or a charitable society, cannot be proceeded against under the Bankruptcy Act in circumstances where it would be necessary to do so, thereby severely undermining the fundamental rights of the Petitioners

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and a multitude of individuals, providers and users afflicted by a common wrong, injury and invasion.

The Respondent No. 1 has filed affidavit in opposition and denied the Statements and allegations made in the Writ Petition and stated inter alia, that the Writ Petition filed by the petitioners is misconceived, mala fide, motivated and for collateral purpose, and as such, the Rule is liable to be discharged with costs.

The respondent No. 6 is carrying on the business legally. Society registered under the Societies Registration Act, 1860 is a legal entity, there is no bar or legal restriction for a society to be a subscriber or promoter of a Company formed for the purpose of carrying on business.

The registration of the Respondent No. 5 given under Societies Registration Act legally and as such Respondent No.5 is permitted to undertake the activity of sponsoring, owning, operating and controlling private Company Limited by shares whose objects are those mentioned in the object clause of the memorandum of BRAC BD Mail Network Limited and the objects of BRAC BD Mail Network Limited which is a separate entity than that of respondent No. 5. The Pro-forma respondent No. 5 was given registration as a promoter/subscriber of a Company to carry on the business within the ambit of the SRA, 1860.

The companies Act, 1994 has created no bar to incorporate a private or public Limited Company with a society registered under the

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Societies Registration Act, 1860 as its subscriber/promoter and the Pro-forma Respondent No. 5 being registered under the Societies Registration Act, 1860 is a legal entity and juristic person and therefore, be entitled to be promoter of a company Limited by shares. It is also stated that Section 20 of the SRA, 1860 does not preclude such society to be promoter limited by shares to carry on business exercise including those mentioned in the object clause of the Memorandum of Association of the Company namely BRACK BD Mail Network Limited.

The shares invested by Pro-forma Respondent No. 5 in the said BRAC BD Mail Network Limited, Respondent No.6 is consistent with Section 20 of the SRA, 1860. In this regard, it is stated that there is no legal bar for the Pro-forma Respondent No. 5 to be Subscriber and promoter of BRAC BD Mail Network Limited. It is also stated that though Section 20 of the SRA, 1860 debar the Pro-forma Respondent No. 5 to carry on business activity directly but do not prevent it to be a sponsor/promoter of a Private Ltd. Company to carry on business. Hence, the Rule is liable to be discharged with costs.


The proforma-respondent No. 5 has filed the Affidavit-in-opposition and denied the statements and allegations made in the writ petition and stated that the writ petition is not maintainable in law and facts. The Petitioners have no locus standi to file the instant writ petition. The petitioners have not urged any loss, damage, harm, or injury caused

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to them personally by the issuance of the impugned Certificate of Incorporation or the activities of the Respondents. Not a single specific allegation has been made in the entire Petition regarding loss, damage, harm or injury to any one of them, be it of a direct or indirect nature. Neither have the petitioners stated that they have filed the Writ petition in the form of a public interest litigation. As such, the Petitioners have filed the Writ petition as mere busybodies, without any locus standi at all. The petitioners have merely described themselves by their educational backgrounds and their work and interests, which do not establish their locus standi either under the constitution, any statute, or under any of the principles enunciated by the Supreme Court of Bangladesh in this respect. None of the petitioners fall within the said well established principles inasmuch as they are not espousing a public cause, their interest in the subject matter is not real and is in the interest of generating some publicity for themselves or to create mere public sensation, they are not acting bona fide and they are busybodies. It is not in the public interest to grant them standing in this matter. They do not espouse the cause of those less fortunate than themselves, nor do their hearts bleed for their less fortunate fellow being for wrongs done by the government in not fulfilling its Constitutional or statutory obligations. Rather it is evident from the petition that they have taken it upon themselves to speak for, among others, the Hon'ble President of the Peoples Republic of Bangladesh, the

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Hon'ble justices of the Supreme court of Bangladesh, the Hon'ble Prime Minister and other Ministers of Bangladesh, the Comptroller and Auditor General of Bangladesh, the Hon'ble Speaker, learned Advocates enrolled with the Bar Council of Bangladesh, and government Servants. It is extremely presumptuous and totally unwarranted, if not downright illegal for the Petitioners to purport to speak for and defend the so-called and alleged encroachment on the rights of the above-named personages, among whom are the highest authorities of the Nation, and with Advocates, the persons best capable of defending their Constitutional and legal rights.

The petitioners have not given one single instance where, in the four years from the grant of the Certificate of Incorporation to Pro-forma Respondent No.5 any uncertainty has been created in any field, and how the state has become ill equipped to detect tax fraud, or how and where any party concerned in this Writ Petition has committed any accounting fraud or that the revenue earning of the country have been damaged in any manner.

The Memorandum of the Society of Pro-forma Respondent No.4 therefore, clearly permits Pro-forma Respondent No.5 to invest its moneys in purchasing shares of a corporate entity, such as Pro-forma Respondent No.5 or exercise the right to sponsor in a private limited

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company, which in its judgment is conducive to the attainment of its charitable and social welfare activities.

In this regard, in the case of BRAC V Prof. Mozaffar Ahmed 22 BLD (AD) 41 at page 61 the Appellate Division of the Supreme Court clearly stipulated as follows:

"28. From the above it is abundantly clear that a society registered under the Societies Registration Act may invest its fund with the object of getting more money for spending in charitable purposes. The main object of this investment is to provide charities to deserving persons and not to make profit. So the investment by BRAC as found from their Memorandum of Association is charity and for perpetuating their object such investment is permissible and we find no wrong in the same."

The Registrar has not prejudiced, undermined, jeopardized and encroached upon the rights of the judges of the Supreme court, the Comptroller General of Audit, the Prime Minister and other Ministers, the Speaker and even the President of the Republic who are subject to Article 147(3) of the Constitution by precluding the said persons from their right to hold office, post or positions or to take part whatsoever in the management or conduct in the affairs of an entity including a charity and that the undertaking of business.

The persons referred to above have no vested right to participate in the activities of the specific charitable institution targeted in this writ

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petition, i.e. BRAC , and if any one of these personages feel that his right has been so hampered in relation to BRAC, he is fully capable of taking recourse to the Hon'ble Court to enforce the said right. It is further denied that by his non-application of mind in allowing BRAC to subscribe in, purchase shares, control, manage, conduct and operate the purported Pro-forma Respondent No.5, the Respondent No.1 has broken down the distinction between a charity and a company and has prejudiced, undermined and encroached upon the rights of the judges of the supreme Court Judges from participating in and under taking activities of charitable societies which the Registrar has permitted to convert into companies for gain and profit. The Petitioners' statement that by allowing Pro-forma Respondent No.5 to be a sponsor in Pro-forma Respondent No.6 has undermined the rights of Judges of the Supreme court , the Comptroller General of Audit, the Prime Minister, other Ministers, Speaker, President, is baseless and has no legal underpinning whatsoever. Pro-forma Respondent No.5 is a separate legal personality and is carrying out business as a private limited company by shares in accordance with the applicable laws of Bangladesh . The statement of the petitioners are vague, general and incomplete and fails to identify any legal wrong or injury, and hence, cannot be the basis for judicial consideration. Pro-forma Respondent No.5 has not converted itself into a company, and that is a self-evident fact.

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The respondent No.6 has filed the Affidavit-in-opposition and denied the material allegations and stated that the Petition is not maintainable in law and facts and the Petitioners have no locus standi to file the instant writ Petition. The Petitioners have not urged any loss, damage, harm, or injury cause to them personally by the issuance of the impugned Certificate of Incorporation or the activities of the Respondents. Not a single specific allegation has been made in the entire Petitioner regarding loss, damage, harm or injury to any one of them, be it of a direct or indirect nature. The Petitioners have not stated that they have filed the writ Petition in the form of a public interest litigation. As such, the Writ Petition has been filed by the writ petitioners without any locus standi at all. The Petitioners have merely described themselves by their educational background and their work and interests, which do not establish their locus standi either under the Constitution, any statute, or under any of the principles enunciated by the Supreme Court of Bangladesh in this respect. None of the Petitioners fall within the said well established principles inasmuch as they are not espousing a public cause, their interest in the subject matter is not real and is in the interest of generating some publicity for themselves or to create mere public sensation, they are not acting bona fide but they are busy bodies. It is not in the public interest to grant them standing in this matter. They do not espouse the cause of those less fortunate than themselves, nor do their hearts bleed for their less



fortunate fellow being for wrongs done by the Government in not fulfilling its Constitutional or statutory obligations. Rather it is evident from the Petition that they have taken it upon themselves to speak for, among others, the Hon'ble President of the Peoples Republic of Bangladesh, the Hon'ble Justices of the Supreme Court of Bangladesh, the Hon'ble Prime Minister and other Ministers of Bangladesh, the Comptroller and Auditor General of Bangladesh, the Hon'ble Speaker, learned Advocates enrolled with the Bar Council of Bangladesh, and Government Servants. It is extremely presumptuous and totally unwarranted, if not downright illegal for the Petitioners to purport to speak for and defend the so-called and alleged encroachment on the rights of the above-named personages, among whom are the highest authorities of the Nation, and with Advocates, the persons best capable of defending their Constitutional and legal rights.

The Writ Petition is also liable to be dismissed in limine as the Petitioners have filed it in a most mala fide manner after over 4 years from the date the certificate of incorporation was issued by Respondent No. 1, wherefore, the writ Petitioners are guilty for gross laches. It would be unjustified and unjust to entertain the writ Petition filed after such a long delay, during which time the Respondents No. 5 and 6 have carried out their statutory duties and compliances with due diligence, where Respondent No. 6 has been carrying on its business, employed numerous

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person, paid revenue dues and provided services to many citizens of the country.

The respondent No.6 stated further:-

- (i) Pro-forma Respondent No. 5 (BRAC) was registered as a society under SRA, 1860 on 9 April 1972, the object for which the society is established are, inter alia, stated in clause 3 of the memorandum of the Society. Sub clause (i) and XIV of clause 3 and clauses 4 and 5 of the memorandum of the society are as under:

Sub Clause (1) of Clause 3: To engage in charitable purposes and social welfare activities strictly on no profit basis.

Sub Clause XIV of Clause 3: To receive donations from persons, institutions or companies from here or abroad and use the same towards the objectives of the Society.

Clause 4: The income of the Society however derived, shall not be distributed to its members by way of dividend, bonous or otherwise.

Clause 5: In case of winding up of Society the surplus income, if any, shall not be distributed to its members but shall be handed over to some other Societies having same of



similar objects being exempted under Section 15D of the Income Tax Act 1922.

- (ii) By another special resolution of the Society on 15.06.1992 the name of Bangladesh Rural Advancement Committee ("BRAC") was changed to its acronym, "BRAC", which was duly registered by RJSC. (Registrar Joint Stock Company).
- (iii) The income of BRAC is inter alia from donations, income from business of projects and related companies and are fully reflected in the Annual Balance Sheet in accordance with the established system and procedure.
- (iv) The Voluntary, Social Welfare Agency (Registration and Control) Ordinance, 1961 was promulgated on 2 December 1961. The preamble of the Ordinance reads "to provide registration and control of voluntary social welfare agency".
- (v) The Foreign Donations (Voluntary Activities) Regulations Ordinance, 1978 (hereinafter referred to as the "Ordinance") was promulgated on 20 November 1978. The preamble of the said Ordinance reads as follows- "to regulated receipts, expenditure of



foreign donations for voluntary activities. In Section 2 of the Ordinance the terms-(a) foreign donations (b) Organizations (c) Prescribed and (d) Voluntary activities have been defined. In defining the aforesaid expressions the word "means" has been used. These definitions are, therefore, exhaustive. The heading of Section (3) is "regulation of voluntary activity. Sub-section (1) opens with the expression not withstanding anything contained in any other law for the time being in force. This expression makes this law, to prevail when there is anything to the contrary in any other law. Section 3(1) reads, inter alia, that no person or organization shall undertake or carry on voluntary activity without prior approval of the Government and Sub-section (2) provides that a person or organization receiving or operating any foreign donation for carrying on any voluntary activity shall register himself or itself with the Government. Section 4 deals with power of inspection Section 5 is penalty for misdirection and that of Section 7 is power to make rules.



- (vi) By Ordinance No. XXXII of 1982, an amendment was made to this Ordinance. All these provisions were made to monitor and control the activities of NGOs. Section 6 as amended provides for cancellation of registration.
- (vii) The government under Circular its No. ERD/NGO-II/SC/86-586 dated 30.09.1986 directed all NGO's to undertake along with their scheduled program some income generating projects on a non profit basis for gradually becoming self-sufficient within 3-5 years.
- (viii) BRAC is duly registered in accordance with the provisions of SRA, 1860 as well as being registered with the NGO Affairs Bureau under Ordinance and department of Social Welfare under the Act of 1960.
- (ix) It is evident that under the laws, rules and notification, BRAC is a voluntary social welfare organization. Its activities are primarily financed by foreign donations. It is an non-profit organization. In the Circular dated 3.9.1986, the External Resources Division of Ministry of Finance has clearly suggested that all NGOs operating in Bangladesh should undertake some income generating projects along with their scheduled

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program on a non-profit basis, so that dependence on foreign donations may diminish. BRAC has been functioning lawfully over the years and without any allegation of infraction of law as referred to the aforesaid ordinance as well as the rules.

- (x) In line with the suggestions and advice of the various Government agencies BRAC's earnings are also from its own income earning projects such as BRAC Printing Press, Aarong Shops and Dairy Products. It also receives income from investment made in companies such as BRAC Industries Ltd (Cold Storage), Delta Brac Housing Finance Corporation Ltd., Brac Bank Ltd. etc. Similarly it will have income from investments made in the shares of Pro-forma Respondent No. 6, which will be used as income of BRAC for its objects and purposes. Like all other business income no part of it will be set apart or utilized for any other purpose. The income from investments in related companies and BRAC's own projects are reflected as income in the audited Balance Sheet and are solely and wholly used for purposes and objects of BRAC. This income augment funds of

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BRAC to carry out and fulfil its purposes and objects.

No part whatsoever of this income is distributed as profit.

- (xi) Under the Income Tax Ordinance, 1984 the income of BRAC was exempted and had always been so exempted read with the 6th Schedule of Part A of the said Ordinance. The expression "charitable purposes" has been defined under the said Ordinance, to include, relief of the poor, education, medical relief and the advancement of any object of general public utility. For the purpose of exemption of income from taxes income included a project undertaking business and earning there from. The question of exemption of taxation of BRAC under the said Ordinance has been settled by a judgment of the High Court Division of the Supreme Court in Reference Application No. 79 and 80 of 1995, judgment delivered on 3 February 1999 by a Division Bench of the Hon'ble court which has been reported in 51 DLR 152. The judgment is final and conclusive.
- (xii) All the income of BRAC, inter alia, from its own projects, investments in related companies and foreign

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donations are reflected in the Annual Balance Sheet of BARC and the latest Balance Sheet of BRAC for the year ending 31 December 2008 would clearly reflect the position of income, the source of the income and expenditure. A copy of the Annual Report containing the Balance Sheet is annexed and marked as Annexure X1

(xiii) In another writ petition, the investment of BRAC had been challenge by Professor Mozaffer Ahmed in which the Hon'ble Appellate Division, ultimately declared the investment to be valid, justified and in line with the Memorandum of BRAC as well as within the purview of Section 20 of the SRA, 1860. The said judgment is reported in 22 BLD (AD) 41, However, leave has been granted on the said judgment in a review petition which is still pending.

The petitioners filed Affidavit-in-Reply on 05.05.2010 against the Affidavit-in-Opposition filed by the Proforma-Respondent No.6 and reiterated the stand taken in the writ petition and stated interalia that:

"A. A Rule Nisi has been issued upon the Bangladesh Rehabilitation Assistance Committee Proforma Respondent No.5

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and the said Bangladesh Rehabilitation assistant Committee has been included as Proforma Respondent only.

B. No rule nisi has been issued upon the Proforma Respondent No.6 which has filed the Affidavit-in-Opposition, nor has the Proforma Respondent no.6 made any application to be included as a Respondent in the Rule Nisi issued by this Hon'ble Court.

C. The Bangladesh Rehabilitation Assistance Committee Proforma Respondent no.5 has not made any application to be included in the Rule Nisi issued by this Hon'ble Court; nor has this Honble Court passed any order to modify the Rule Nisi to include the Bangladesh Rehabilitation Assistance Committee in the Rule Nisi so issued.

D. The Proforma Respondent no.6 has not filed any Application before this Hon'ble Court to be included in the Rule Nisi.

E. When not included in the Rule Nisi, the Hon'ble Court may not hear any person including a Proforma Respondent No.6 for determination whether the Rule Nisi may be made absolute or discharged by this Hon'ble Court."

The petitioners stated that a Rule Nisi was issued upon the Respondent No.1 only, that is the Registrar of Joint Stock Companies and Firms, and not on the Proforma Respondent No.6, that is the purported BRAC BD Mail Network Limited.

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The Petitioners deny that the Petition is not maintainable in law and have no locus standi to file the instant case. This Writ Petition is preferred as the Respondent No.1 has unlawfully issued the impugned Memorandum and Articles of Association (Annexure B) accepted by the Respondent No.1 and the impugned Certificate of Incorporation dated 23.11.1996 "Annexure B-1" "concerning a public wrong, public injury and invasion of fundamental rights of an indeterminate number of people, any number of people, any member of the public, being citizens suffering the common injury or common invasion in common with others or any citizen or an indigenous association espousing that particular case, and the Petitioners are aggrieved persons and are entitled to invoke the jurisdiction of this Hon'ble Court under Article 102 of the Constitution" per 49 DLR (AD)1-para 49 The Case of Dr. Mohiuddin Farooque vs. Bangladesh, further the Petitioners affirm that there has been no material delay in the filing of the Writ Petition inasmuch (i) on the day the Writ Petition was filed, public wrongs were committed by the Respondent No.1; (ii) the public wrongs committed by the issuance of the impugned Annexure- "B" were continuing public wrongs and merited a declaration to that effect; (iii) that the public wrongs so committed were and are so extensive in their scope and nature that, as averred by the Petitioners, there would be a serious undermining of the commercial, financial and more importantly legal framework of the country (per para 19 of the Writ

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Petition): (iv) that the public wrongs would completely break down the distinction between an entity for charitable purposes and a commercial or business entity and thereby preclude Judges of the Supreme Court, the Comptroller General, the Prime Minister and other Ministers, the Speaker and even the President of the Republic who are subject to Article 147 (3) (4) of the Constitution from their right hold office, post or position or to take part in the management and conduct of charitable and non-profit entities (v) that the public wrongs so committed would undermine, be conflictive with, denude, render meaningless, idle and nugatory the rights conferred upon them by express law; (vi) further that under the Government Servants (Conduct) Rules, 1979, Rules 16 and 17 read together, made under Article 133 of the Constitution, the rights subsisting and vested upon Teachers of Dhaka University would also be denuded from above, render meaningless, idle and nugatory the rights conferred upon them by express law; (vii) further what would apply to Teachers of Dhaka University, would also apply to Rajshahi University, and other State Universities established by statute; (viii) similar would be the case with Advocates; governed by the Bar Council (ix) further Articles 27 and 31 of the Constitution underpinned by Doctrine of equality embodied in Articles 27 and 31; (x) Freedom of Association of the general population of the Republic; and (xi) fraud on the law and Constitution, etc.

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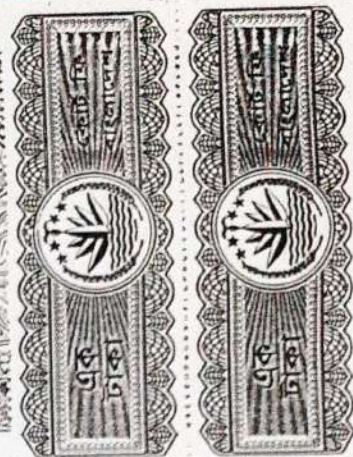


The petitioners stated further that they have filed this Writ Petition strictly and comprehensively in accordance with the criteria for moving a Writ petition as laid down in the Mohiuddin Farooque vs. Bangladesh Case 49 DLR (AD) 1997 page-1, especially at paragraphs 48-49, 50 and 51 per Mr. Justice Mustafa Kamal; and which judgment is referred to as the "main judgment" by the Chief Justice Mr. A.T.M Afzal; further the criteria for *locus standi* pronounced by Mr. Justice Latifur Rahman at paragraphs 77 and 78 are also not inconsistent with the "main judgment" delivered by Mr. Justice Mustafa Kamal referenced above (per Para 2); that the Proforma Respondent No.6's understanding of the *locus standi* of a Writ Petition concerning a public wrong is misconceived or indeed expressed to mislead this Hon'ble Court: that damage, harm or injury to anyone of them personally is not a requirement to bring public interest litigation before this Hon'ble Court. Thus, per Mr. Justice Mustafa Kamal the criteria for determining *locus standi* in the landmark case on *locus standi* concerning a public wrong is set out below as it features in the Mohiuddin Farooq case in paragraphs 48, 49 and 50;

Thus, under paragraphs 48, 49, 50 the co-petitioners meet the criteria in the scheme of our Constitution to bring this Writ Petition.

The Respondent No.1 committed wrongs *ab-initio* so that his acceptance of the impugned Memorandum of association and the issuance of the Certificate of incorporation are void abinitio and therefore the

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continuance of the wrongs committed *ab-initio* constitute continuation of the public wrongs; and in fact generate further public wrongs and evil consequences in law.

The petitioners stated that the laws breached are several and so many, including Articles 147 (3) (4) which in turn engender a plethora of other constitutional provisions and several statutes; hence it is an absolute mis-statement that not one single specific instance of any violation of any law has been stated;

The Petitioners reiterate their averments made in the writ petition and state further that the quantum of how much taxes paid, is irrelevant when the action of the Respondent No.1, an executive discharging the functions of the Republic, is void abinitio and its continuance a continuing public wrong and wrongs with evil legal consequences (as distinct from any "good" factual consequences); or that the action of the Respondent No.1 is consistent with the Companies Act, 1994 or other legislation which are inapplicable before the Writ jurisdiction exercised by this Hon'ble Court;

The Petitioners deny the legal validity thereof, and state that it is irrelevant to seek to invoke legal validity of the incorporation of the Proforma Respondent No.6 under the Companies Act, 1994 since the issue before this Hon'ble Court is whether a society registered for charitable purposes and strictly not for profit has been so registered under

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the Act for the Registration of Literary and Scientific and Charitable Societies, 1860;

With references to the *locus standi* of the petitioners the Petitioners iterate the averments made in the affidavit-in-opposition are misconceived and inconsistent with the law as laid down in paragraphs 48, 49, 50, 51 of the Mohiuddin Farooque Case and mentioned in paragraph 4 above of this Affidavit-in-Reply; further that an entity born as a charitable society may never convert to a private company and thereafter, as public company. In the present instance the demise of the Proforma Respondent No.6, lies in the fact that it was purportedly born from an entity under the Societies Registration act as a society for charitable purposes, so that it could never convert to a private company and thereafter, as a public company.

Mr. Taufique Nawaz, appearing for the petitioners has placed the Writ Petition, Annexure there to, affidavit in opposition filed by the respondent No. 1, 5 and 6 and also affidavit in replay filed by the petitioners against the affidavit in opposition filed by the respondent No.6

Mr. Taufique Nawaz, the learned Advocate has been trying to impress this Court that the BRAC has been Registered under Societies Registration Act 1860 and of the law of Charities under common law, the *modus operandi* of a such Society and the rights of a vast multitude of persons including judges of the Supreme Court, Prime Minister and other Minister, the Controller, auditor General, the Speaker and even the

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president of the Republic together with Government servant, various professionals including University teachers and any other person who might wish to under take Charitable works shall be at jeopardy.

The learned Advocate submits that the respondent No. 1 before entertaining the Memorandum and Articles of Associations of the proforma respondent No. 6 by issuing the impugned certificate of incorporation failed to ascertain the legal capacity of Proforma respondent No. 5 i.e. a registered society as to whether can invest, sponsor and subscribe the shares of a company and also whether respondent No. 5 can own, control and operate any company not being a person having such a legal capacity as a registered society under the Registration Act, 1860 and also failed to appreciate that the proforma respondent No. 5 whose aims and objects as set out in its Memorandum of Association do not permit the respondent No. 5 to sponsor, invest, subscribe, own, control and undertake the business of Telecommunications and in other establishment. The Registrar also failed to consider that the proforma respondent Nos. 7, 9 and 10 being employees of the respondent No. 5 have no independent or separate status other than respondent No. 5 to sponsor or subscribe a company by shares. The respondent No. 1, the Registrar also failed to appreciate that the ownership, control, management and the undertaking of business by the Proforma Respondent No. 5 is unlawful in as much as it is inconsistent with several laws including, in particular the laws of

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dissolution and winding up of companies and the laws of the ultimate liability of the owners/shareholders, the Proforma respondent No.5 as a shareholder being incapable of being wound up as a charity or as a registered society under the Societies Registration Act, 1860 or under the Bankruptcy Act, 1997.

The learned Advocate again submits that the respondent No. 4 failed to appreciate that the respondent NO. 5 is not capable of using funds received as foreign donations, whether wholly or partially, for undertaking activities not provided for under the Foreign Donations Voluntary Activities (Control and Regulation) Ordinance, 1978 nor does the Proforma Respondent No. 5 have the legal capacity, ab initio, to subscribe in, purchase shares, control, manage, conduct and operate a company, or under take to provide internet services.

The learned Advocate further contends that the respondents have acted public interest by attempting to circumvent the existing laws of Bangladesh, acting with ulterior motive, with malafide intent, and to enlarge their activities beyond limits laid down by the law with evil consequences flowing there from and that the undertaking of ownership, subscription and investing of monies in an entity purporting to be a public company involved in the business of, amongst others, Telecommunications and providing internet services by the proforma Respondent No. 5 through the unlawfully constituted Proforma



Respondent No.6 would be violative of Article 102 inasmuch as the impugned Memorandum and Articles of Association and the Impugned Certificate of Registration concern a public wrong , public injury and invasion of fundamental rights of an indeterminate number of people, any number of people, any member of the public, including judges of the Supreme Court, the Prime Minister and other Ministers, the Speaker and even the President, government of Servants, Various professional persons including Advocates, University Teachers , and any individual who might chose to undertake charitable work as distinct from activity for profit or gain, however, intermediate such activities might be for profit or gain, being citizens suffering the common injury or common invasion in common with others or any citizen or an indigenous association espousing that particular cause, and the petitioners are persons aggrieved and are entitled to invoke the jurisdiction under Article 102 of the Constitution .

Mr. Newaz before conclusion of his submissions has handed over a well thought written argument containing 22 pages. It appears from the argument that the learned Advocate has summarized his submissions in paragraph No. 21 which we tempted to quote in verbatim:-

" 21. Counsel for the petitioners summarises as follows:

1. That the Societies Registration Act, 1860, under which the Respondent No.5 was registered, does not authorize the undertaking of

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internet services as an activity independently or by any of the entities mentioned therein;

2. That the Societies Registration Act, 1860, under which the Respondent No.5 was registered, does not authorize creation, promotion, subscription in control of or the operation of an entity for making profit.

3. That the Societies Registration Act, 1860, under which the Respondent No.5 was registered, which provides for the registration of a society for charitable purposes, does not contemplate the creation, promotion, subscription in control of or the operation of an entity for making profit by a charitable society such as the Respondent No.5.

4. Neither the statutory meaning of charitable purpose provide in Section 2(16) of the Income tax Ordinance, 1984 nor the leading case law of the Supreme Court contemplates the undertaking of internet services and the other multiple services contemplated in the Memorandum of Association of the Respondent No.6 which by admission of the Respondent No.5 was created by investments made by the Respondent no.5 and by which reason the Respondent No.5 made an application to appear before this Hon'ble Court.

5. That the Foreign Donations (Voluntary Activities) Regulation Ordinance, 1978, under which the Respondent no.5 was also Ordinance, 1978, under which the Respondent nO.5 was also registered, does not authorize the undertaking of internet services and other multiple



services as a recipient of foreign donations, whether the donations which it has are wholly or partly from a foreign donor, given that the Respondent No.5 is admittedly the society for charitable purposes, initially registered under the SRA, 1860, has invested huge monies to create the Respondent No.6 and has appeared before this Hon'ble Court to safeguard its (the Respondent No.5's) interests;

6. That the Societies Registration Act, 1860 and the FDVAR Ordinance 1978 (read with the FDVA Amendment Ordinance 1982) are the two statutes governing the capacity, scope and extent of the two activities which authorize the activities which may be undertaken by the Respondent No.5 and for which a certificate of incorporation may be issued by the Respondent No.1 namely the Registrar of Joint Stock Companies/Societies and which certificate of incorporation issued in favor of the Respondent No.6 is ultra vires of the said governing statutes.

7. That the SRA 1860 may not be read in isolation in interpreting the legal capacity of the Respondent No.5 to undertake internet services through its purported creation namely the Respondent No.6 since by the issuance of the certificate of registration the Respondent No.1, i.e. the Registrar, has disregarded Articles 38 and 147(1), (2), (3), (4) inasmuch as these Constitutional provisions grant fundamental rights, and Constitutional rights to persons who would be adversely affected by virtue of the Registrar's interpretation that an entity for charitable

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purposes may as a result of his order undertake activities in conflict with the statutory definition of Charitable Purposes and the case law of the Supreme Court thereby altering its meaning to enable the Respondent No.5 to undertake internet services through its creation, the Respondent No.6.

8. That the Conflict generated by the Respondent no.1, the Registrar, through this issuance of the Certificate of the Respondent nO.5 directly illaffects the provisions of the Constitution which arising from Article 147(1), (2), (3), (4) pervade the entire Constitution namely the sixty seven articles which contemplate the Constitutional Personality of the President who would be adversely affected by a change of meaning of "not for profit or gain" and would have his rights and privileges Undermined, denuded, dismembered, rendered idle, meaningless, redundant and inoperative.

9. Similarly the conflict generated by the Respondent No.1, the Registrar, through his issuance of the Certificate of incorporation in favour Respondent No.6, a creation of the Respondent No.5 directly ill-affects the provisions of the Constitution which arising from Article 147 (1), (2), (3) (4) pervade the entire Constitution namely the Articles which contemplate the Constitutional Personality of the Prime Minister who would be adversely affected by a change of meaning of "not for profit or gain" and would have his rights and privileges undermined,



denuded, dismembered, rendered idle, meaningless, redundant and inoperative.

10. Similarly the conflict generated by the Respondent No.1, the Registrar, through his issuance of the Certificate of Incorporation in favour Respondent No.6, a creation of the Respondent No.5 directly ill-affects the provisions of the Constitution which arising from Article 147(1), (2), (3), (4) pervade the entire Constitution namely the ... articles which contemplate the Constitutional Personality of the Speaker and Deputy Speaker who would be adversely affected by a change of meaning of "not for profit or gain" and would have his rights and privileges undermined, denuded, dismembered, rendered idle, meaningless, redundant and inoperative.

11. Similarly the conflict generated by the Respondent No.1, the Registrar, through his issuance of the Certificate of Incorporation in favour Respondent No.6, a creation of the Respondent No.5 directly ill-affects the provisions of the Constitution which arising from Article 147(1), (2), (3), (4) pervade the entire Constitution namely the Articles which contemplate the Constitutional Personality of the Comptroller and Auditor General, who would be adversely affected by a change of meaning of "not for profit or gain" and would have his rights and privileges undermined, denuded, dismembered, rendered idle, meaningless, redundant and inoperative.



12. That such ill or evil effect flowing from the Registrar's action is contrary to the scheme of the Constitution inasmuch as all of the above Constitutional Persons jointly and individually discharge functions of the Republic so that the denudation of their fundamental rights and privileges conferred under Article 147(1) (2)(3) and (4) would encumber the discharge of their high Constitutional responsibilities and preclude them from discharging such responsibilities.

13. The Registrar's issuance of a Certificate of Incorporation to the Respondent No.6 admittedly an investee-creation of the Respondent No.5 being ultra vires of the SRA 1860 and FDVAR 1978 read with its amendment of 1982 which in turn affect the scheme of the Constitution and all its high functionaries has resulted in enabling an ultra vires regime beyond the scheme of the Constitution, the Constitutional provisions mentioned above, the statutes made under the Constitution so that its operations and continuance constitute an extra-Constitutional, extra-statutory regime.

14. No less would the evil effect of the action of the Registrar, the Respondent No 1 fall upon persons subject to Article 133 of the Constitution concerning the services of the Republic and the Rules of Conduct for Government Servants 1979, vide sections 16 and 17 whereby government servants are authorized to undertake certain voluntary activities or even pecuniary activities subject to commission validly

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granted under the government Servants Conduct Rule, 1979; that where such activities permitted to government servants require the authorization of law the Respondent No.1 i.e. the Registrar has proceeded to issue a Certificate of Registration to the profit making company namely the Respondent No.7 which is an investee created by a mother entity which cannot even conceive the activities of the Respondent No.5, nor undertake profit making as an object of its Charitable Purpose status.

15. That in the Writ Petition Counsel drew attention to the requirements of a University teacher to obtain authorization under The Dhaka University Ordinance 1973; the first Schedule, statute.... Article 38(2) whereby it was a requirement to obtain authorization deriving from statute (law) for the undertaking of voluntary activities, activities not constituting the main occupation and indeed the denial of pecuniary returns. "Counsel therefore submits that authorization derived from law whether by statute or other legal instrument is a requirement for the undertaking of activities by a person whose conduct and activities are governed by statutes or other law.

16. Counsel further submits that even in the case of professionals such as advocates governed by the Bar Council Order No.... 1972 as it also is true with physicians and surgeons under the Bangladesh Medical Council Ordinance. The said professionals are required to obtain authorization to undertake activities given that their status and functions

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is governed by a parent law; but without such authorization the undertaking of an activity not contemplated in the parent statute would be ultra vires of the statute.

17. That the complete disregard of the Constitution, of the governing statutes and various regimes contemplated under the laws of Bangladesh had led to a fraud upon the Constitution. The governing statutes and other laws have established a regime of a Society for Charitable Purposes, a recipient of foreign donations well beyond the Rule of Law in the People's Republic of Bangladesh.

18. It is submitted that, on the basis of the above submissions presented only in Written Summary and having regard to the oral submissions made in your Lordships Court entrusted to preserve protect and defend the Constitution, the Constitutional personalities, the Constitutional institutions they embody and represent, uphold the Rule of Law and in the most discernible sense of the term "public interest", Your Lordships may kindly make the Rule Absolute."

In developing the argument, Mr. Nawaz has taken us through:

- I. The Societies Registration Act.
- II. The Foreign Donation Act 1978 and amendment thereof made in 1982.
- III. The Company Law.
- IV. The Constitution of the People's Republic of Bangladesh.

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Mr. Newaz to support his contentions has relied upon the following authorities:-

A. The Rules for constitutional and Statutory Interpretation

(i) 9 DLR(1957) SC 178 at pp 186-188 paragraphs No. 20 and 22 where several cardinal principles were laid down to aid the interpretation of statutes.

(ii) 48 DLR (AD) (1996) page 188, para 14: NCTB vs. Shamsuddin

(a) Presumption always in favour of Constitutionality of an enactment, i.e. (a) express words will prevail,

(b) Rule concerning express words implies that express words cannot be rendered idle and nugatory.

(i) 26 DLR(SC) (1974) page 7, para 22.

(ii) (1994) 14 BLD (AD) Page 239, para 9-10.

B. Provisions should be considered as a whole, not by piecemeal fashion.

(i) 37 DLR (AD)(1985) page 84, para 26.

(ii) 32 DLR (AD)(1980) page 57 para 3.

C. If there is a conflict between law and regulation, law will prevail

(i) 47 DLR(AD)1995 page 5, para 13.

(ii) 41 DLR (AD) (1989) page 43 para 29.

(iii) 50 DLR (AD) page 27 and 34 para -22.

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D. Curtailment of jurisdiction of superior Court must be done by express words and not by implication.

- (i) 41 DLR (AD) page 165 and 221 paras 219-220.
- (ii) 41 DLR (AD) page 208 para 116.

E. An Amending law becomes part of the constitution but an amending law cannot be valid if it is inconsistent with the Constitution.

- (i) 41 DLR (AD) page 263 para 416.
- (ii) 1981 BLD(AD) page 491 (g) (h)

F. If the above rule is applicable to an amending law, surely it must as a principle be applicable to an administrative action which has effect of changing the law.

- (i) 41 DLR (AD) page 263 para 416.

Mr. Rokanuddin Mahmud, the Senior learned appearing for the proforma respondent No. 6 with Mr. Md. Asaduzzaman, the learned Advocate at the very outset has drawn our attention to the Rule issuing order dated 5.11.2000 which is reproduced below:-

“ Let a Rule be issued calling upon the respondent No.1 to show cause as to why the impugned memorandum and Article of Association (Annexure-B) accepted by the Respondent No.1 and the impugned certificate of Incorporation dated 23.11.1996 (Annexure-B) issued by the respondent No.1 to the proforma respondent NO.6 shall not be declared

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to have been made without lawful authority and is of no legal effect and or such other or further order or orders passed as to this Court may seem fit and proper" and pointed out from the order that the certificate of incorporation dated 23.11.1996 (Annexure-B) issued by the respondent No.1 to the Proforma respondent No. 6 has been challenged by the petitioner.

Mr. Rakanuddin Mahmud, the learned Advocate further submitted that he does not need to give reply to the contentions of the learned Advocate for the petitioners on merit in as much as similar writ petition filed by Prof. Mujaffar Ahmed and others wherein Mr. Taufique Nawaz the learned Advocate appeared for the petitioners and raised similar points before the High court Division and also before the Appellate Division and the Appellate Division finally resolved those points at issue as have been raised now in the present case. He submits, it would be found from the judgment of the Appellate Division that their Lordships had already considered and answered similar points which has been reported in 22 DLR (AD) 2002 page 41. Their Lordships of the Appellate Division clearly held that a Society Registered under Societies Registration Act, 1860 is to be governed by its Memorandum of Association.

Admittedly, BRAC is a Society Registered under the Societies Registration Act and as such, it is guided under this Act and also by its own memorandum and further held that:

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"So in view of the aforesaid and in view of the Memorandum of Association of BRAC any money belonging to BRAC may be invested by them and it can be done for the purpose of welfare of the society and its beneficiaries. The Societies Registration Act has not provided for any bar in the investment by BRAC which has been there in their Memorandum of Association" In view of such decision given by the Appellate Division of the Supreme Court the present writ petition is not maintainable as the decision of the Appellate Division is binding upon this Court. To substantiate his argument he has taken us through the paragraphs No. 9, 11, 12, 15, 16, 17, 19, 21, 22, 23, 24, 25, 28 and 30 of the decision of the Appellate Division.

The learned Advocate further contends that the Appellate Division had already decided the matter on merit and as such there is no scope to re-agitate the matter in issue which had substantially and effectually been adjudicated. He submits further that the Appellate Division has granted leave to the review petition which is pending for hearing but the operation of the judgment has not been stayed and as such, this court cannot entertain any such issue or issues before finally disposed of the review petition by the Hon'ble Appellate Division.

Finally, Mr. Mahmud submits that the present writ petition is not maintainable in the facts and circumstance of the aforesaid premises and as such the Rule is liable to be discharged. He submits that the Petitioners

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have no 10 custandti to move this Writ petition not being aggrieved by the action of the respondent No.1.

Mr. Fazle Noor Taposh the learned Advocate appearing for the proforma respondent no. 5 has candidly adopted the submissions of Mr. Rokanuddin Mahmud, the learned senior Advocate and developed his argument taking us through the paragraphs 8, 16-20, 22,23, 24,25,26 and 28 of the writ petition submitted that similar statements made in the earlier writ petition filed by Prof. Mojaffar Ahmed and others and the Appellate Division considered those facts and settled those facts substantially but with a difference of few words and thereby, he submits that this writ petition is not maintainable in its present form.

Mr. Taposh then has taken us to sub-paragraph No.(i) (ii) (iii)(iv) and (v) and submits that the persons referred to above have no vested right to participate to that activities of the specific charitable institution because none of them are in any way connected with the BARC either as employee or any person having sufficient interest in the subject matter by which they can be characterized as a vulnerable, weak or socially disadvantaged group.

In the instant writ petition, the petitioners have utterly failed to show that the writ petitioners have moved this High Court Division for an on behalf of themselves and also of other less fortunate persons of the society and the petitioners are in no way affected by the action of the

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Respondent No.1. Under such, circumstances Mr. Taposh contends that the writ petition is not maintainable and is liable to be discharged.

Mr. Newaz, the learned Advocate for the petitioners refuting the submissions made by Mr. Rokanuddin Mahmud and Mr. Fozle Noor Taposh has reiterated that the petitioners have locus standi to file the writ petition on the basis of the decision in the case of Dr. Mohiuddin Faruque vs. Government of People's Republic of Bangladesh reported in 49 DLR (AD) page 1 paragraphs No. 48, 49 and 50 in as much as damage harm or injury to any one of the petitioners personally is not the requirement to bring public interest litigation and the criteria for determining Lucas standi has already been settle in the aforesaid decision and as such the writ petition is not maintainable. He submits that the present writ petition was filed on fresh cause of action and the issues have to be decided having regard to the facts of the present case. The issues which had been settled by the Appellate Division are pending before the Appellate Division as their lordships of the Appellate Division have granted leave to consider their decision in a review petition which is pending.

He further submits in view of granting leave to hear the matter settled earlier by the Appellate Division in review. In that case, there is no impediment to adjudicate the issues as have been raised in the present case.

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The petitioners have not urged any loss, damage, harm, or injury caused to them personally by the issuance of the impugned Certificate of Incorporation or the activities of the Respondents. Not a single specific allegation has been made in the entire Petition regarding loss, damage, harm or injury to any one of them, be it of a direct or indirect nature. The petitioners are not less fortunate people and are in any way affected by the impugned order. The petitioners have not stated that they have filed the Writ petition in the form of a public interest litigation. So, in no way the petitioners status be considered as an aggrieved person as contemplated under Article 102 of the constitution and also on the basis of the decision in the case of Dr. Mohiuddin Farooque reported in 49 DLR (AD) 1.

In this connection the case reported in 22 BLD (AD) 41 Paragraph 11 is relevant which is reproduced below:

11. This writ petition has been filed under Article 102 of our constitution which provides that the High Court Division on the claim of any person aggrieved may give such directions or orders to any person or authority including any person performing any function in connection with the affairs of the republic as may seem appropriate for the enforcement of any of the fundamental rights conferred by is aggrieved as provided under this Article may move the High Court Division for issuance of certain orders and directins and who is the person aggrieved

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We have given our anxious consideration to the materials on record and upon hearing the learned Advocate of both the sides and on consideration of the relevant laws we hold the Writ Petition is not maintainable in its present form and the Petitioners have no locus standi to file the instant writ petition.

Admittedly, the BRAC as a Society has been registered under the Societies Registration Act 1860. The preamble of the Act provides the purpose for which the Act was promulgated and those are meant for the promotion of literature, science or the fine arts, or for the diffusion of useful knowledge for the charitable purpose and section 20 provided that charitable society may be registered under this Act. It also provided in this Act that a charitable society must have a Memorandum of Association showing the name of the society, the object of the Society, names, addresses and occupations of the governing directors, committee or other governing body to whom by rules of the Society, the management of its affairs is entrusted and copy of the rules and regulations of the Society certified to be a correct copy by not less than three of the members of the governing body shall be filed with the Memorandum of Association. Section 5 of the Act provides that after registering the Society the Registrar shall certify that the Society has been registered under this Act and it has also provided in section 6 that every Society registered under this Act may sue or be used in the name of the president, chairman or

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in a petition filed under Article 102 of the Constitution the Court will have to decide in each case, particularly when objection is taken not only the extent of sufficiency of interest but also the fitness of the person for invoking the discretionary jurisdiction under this article 102 of the constitution. It has also been held by the Hon'ble Chief Justice e that ordinarily it is the affected party which is to come to the court for court for revedy. The court in considering the question of standing in a particular case, if the affected party is not before it and if tit finds no satisfactory reason for non-appearance of the affected party it may refuse to entertain the application. This is clear a decision on the matters of locus standi bona fide of a writ petitioner in a public interest litigation. It has been settled that expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortune fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations.

In the entire writ petition there is nothing to show that the writ petitioner moved the High court Division for and on behalf of himself and also of other less fortunate persons of the society who have no source and means to invoke the jurisdiction of the High court Division or these less fortunate people are in any way affected by the impugned orders. The writ petition has been filed by no stretch of imagination can be styled to have filed on behalf of less fortunate persons.

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insuch alleged public interest litigation has been clearly and thoroughly discussed and decided by this Division in the case of Dr. Mohiuddin Farooque reported in 49 DLR (AD)1. In this decision Justice Mustafa Kamal had disposed of the question of locus standi in the judgment in paragraph 47, 48, 49 and 50. It has been propounded that interpreting the work "Any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the constitution. It has been held that in so far as it concern public wrong or public injury or invasion on the fundamental rights of an indeterminate number of people any member of the public being a citizen suffering the common injury or common invasion in common with others or any citizen or an indigenous association as distinguished from a local component of a foreign organization espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under article 102 of the constitution. Agreeing with Justice Mustafa Kamal, Justice B.B. Roy Choudhury in paragraph 97 of this decision has held that inescapable conclusion is that the expression person aggrieved means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligation. In paragraph 9 of the judgment His Lordship the Chief Justice observed that



principal secretary or trustees as shall be determined by the rules and regulations of the Society. In the entire Act nothing has been mentioned as to the procedure or limitation on the investment, if any to be made by the Society. Section 2 provides that a Society registered under this Act must have a Memorandum of association and it must contain the rules of the Society regarding management of its affairs. These indicate that a Society registered under this Act is to be governed by its Memorandum of Association. Admittedly BRAC is a Society registered under the Societies Registration Act and as such, it is guided under this Act and also by its own memorandum.

Admittedly BRAC was registered under the Societies Registration Act and this is a charitable society. The controversy has been raised from the side of the writ petitioners that as it is a charitable society, it can not invest its money. Their further case is that BRAC can not enter into any transaction for earning profit.

We find from the Writ Petition that a society registered under the Societies Registration Act may invest its fund with the object of getting more money for spending in charitable purposes and we can profitably use the decision in the case of BRAC vs. Professor Muzaffar Ahmed and others reported in 22 BLD(AD) page 41 paragraphs No. 23, 27 and 28.

“23 So in view of the aforesaid and in view of the Memorandum of Association of BRAC any money belonging to BRAC may be

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invested by them and it can be done for the purpose of welfare of the society and its beneficiaries. The Societies Registration Act has not provided for any bar in the investment by BRAC which has been there in their Memorandum of Association.

27. Admittedly BRAC was registered under the Societies Registration Act and this is a charitable society. The controversy has been raised from the side of the writ petitioner-respondent that as it is a charitable society it can not invest its money. Their further case is that BRAC can not enter into any transaction for earning profit. We have already noticed that Mr. Tawfique Nawaz contended that by such investment in business fund of the society may be alienated which has been seriously objected to by Syed Ishtiaq Ahmed. He submits that for the purpose of securing more fund to be used for charitable purposes the surplus money may be invested and the profit earned may be used for the purpose for which the charity was established. In support of his submission Syed Ishtiaq Ahmed placed reliance in All England Law Reports 1958 page 612 wherein it has been found as follows:

Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it

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returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is conducted for profit which I take to mean conducted for the purpose of making profit. Many charitable bodies such as colleges and religious foundations have large funds which they invest at interest in stocks and shares or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religious as the case may be. The investing of funds is not one of their objects properly so called but only a means of achieving those objects. So here, it seems to me, that if the making of profit is not one of the main object of an organization, but is only a subsidiary object that is to say, if it is only a means whereby its main objects can be furthered or achieved then it is not established or conducted for profit".

22. From the above it is abundantly clear that a society registered under the Societies Registration Act may invest its fund with the object of getting more money for spending in charitable purposes. The main object of this investment is to provide charities to deserving persons and not to make profit. So the investment by BRAC in BRAC Bank Limited is not for



profit. The object of BRAC as found from their Memorandum of Association is charity and for perpetuating their object such investment is permissible and we find no wrong in the same".

We have gone through the decisions in the case of BRAC vs. Professor Muzaffor Ahmed and others reported in 22 BLD(AD) page 41 and also gone through the writ petition and found that the similar statements made in several paragraphs of this writ petition which had been made in the earlier writ petition. We are of the considered view that the similar points resolved earlier as to the eligibility of investment of the BRAC for the purpose of welfare of the society and its beneficiaries. And as such, it does not need to further adjudicate the same issue as to whether respondent No. 5 the BRAC, has the capacity to invest in the business of the respondent No.6. "BRAC BD Mail Network Limited". On analyses of the entire facts, the laws and the decisions including the decision reported in 22 BLD (AD)41, it has clearly been emerged that the respondent No. 1 by giving registration to the respondent No.5 under the provision of societies Registration Act, 1861 has not violated the rights of any group /class of people not to speak of the rights of the Hon'ble President, Prime Minister, Judges of both the Divisions of the Supreme Court and other classes of the people and professionals of the state.

On further scrutiny of the materials, it appears that the decision of the respondent No. 1 in giving registration to the respondent No. 5 has in

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no way contravened the Articles 38 and 147 (1), (2), (3) and (4) and thereby the Constitutional personality of the Hon'ble President, Prime Minister and Judges of the Supreme Court of both the Divisions and others has not been adversely affected in as much as if such occasion arises in that case they are prudent enough to protect their individual rights as has been guaranteed by the constitution and other laws of the country.

In Writ Jurisdiction, there is no difference between principal respondent and the proforma respondent and as such there is no legal impediment in hearing the proforma respondents. Moreover, we have found that allegations have been attributed against the proforma respondent Nos. 4 and 5 but they were not made principal respondents but made as proforma respondents though they are entitled to give replay to the allegations made in the writ petition. Considering such aspect of the case, we have allowed the proforma respondents to file affidavit in opposition and contest the rule.

On further evaluation of the materials, it appears that the respondent No. 5 in no way exceeded the authority as contemplated under section 20 of the Society Registration Act, 1860 in making investment in the respondent No. 6.

Admittedly, the Appellate Division of the Supreme Court has granted leave in order to review its earlier decision but the operation of



the judgment reported in 22 BLD (AD) 41 has not been stayed and as such, we are of the opinion that this court cannot entertain similar issue for adjudication as the operation of the judgment had not been stayed and that the decision of the Appellate Division is binding till such decision is reversed, varied and reviewed by it self. We are of the further view that if the Appellate Division allows the review application in that case the point raised before this court would be sufficiently answered.

In the light of the findings made before, we do not find substance in this Rule. Accordingly, the Rule is discharged with out any order as to costs.

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Md. Mamtaz Uddin Ahmed.

Naima Haider, J:

I agree

Naima Haider.

Type by: Nurun Nahar
7.3.2011.

Read by:

Exed. by:

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